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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 74

FEDERAL TRADE COMMISSION, PETITIONER

v.

HENRY BROCH AND COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The court of appeals rendered no opinion in modifying the order of the Federal Trade Commission. The opinion of the Commission (O.R. 204–211)[1] is reported at 54 F.T.C. 673. The prior opinion of the court of appeals (O.R. 218–224), and the opinion of this Court when the case was previously before it, are reported at 261 F. 2d 725 and 363 U.S. 166, respectively.

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[1] The Court granted a joint motion to use in this case the record in No. 61, October Term, 1959 (R. 53). We shall refer to that record as "O.R." and to the record in the present case as "R."

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1960 (R. 51), and on January 31, 1961, the time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark to April 1, 1961 (R. 52). The petition was filed on March 31, 1961, and was granted on May 15, 1961 (R. 53; 366 U.S. 923). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court below erred in narrowing *sua sponte* the scope of the Federal Trade Commission's cease-and-desist order, when respondent had not attacked the breadth of the order before the Commission.[2]

2. Whether the Commission exceeded the discretion vested in it to determine the relief appropriate and necessary to prevent further statutory violations when it prohibited respondent from engaging in conduct found to violate Section 2(c) of the Clayton Act, without confining the prohibition to transactions between the particular seller and buyer involved in the violations which the Commission had found.

STATUTE INVOLVED

Section 11 of the Clayton Act, as it existed prior to its amendment by the Act of July 23, 1959 (73 Stat.

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[2] A related question is presented in *National Labor Relations Board* v. *Ochoa Fertilizer Corporation, et al.*, No. 37, this Term, set for argument immediately before this case.

243), is the statute primarily involved (15 U.S.C. 21).[3] With immaterial exceptions, it authorizes the Federal Trade Commission to enforce compliance with Section 2 of the Act and provides that if the Commission has reason to believe that any person is violating or has violated any of its provisions, it shall issue a complaint stating its charges, and give notice of a hearing thereon. It further provides:

> If upon such hearings the Commission * * * shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, * * * in the manner and within the time fixed by said order. * * *
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> * * * * * *
>
> Any party required by such order * * * to cease and desist from a violation charged may obtain a review of such order in [the] United States court of appeals by filing in the court a written petition praying that the order * * * be set aside. * * * Upon the filing of such petition the court shall have * * * jurisdiction to affirm, set aside, or modify the order * * *.

The substantive provision which the respondent violated is Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13. It provides:

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[3] Section 2 of the Act of July 23, 1959 (73 Stat. 245), makes the amendment inapplicable to review proceedings initiated prior to that date.

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT

In *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, this Court upheld the determination by the Commission that respondent Broch, while acting as a broker for Canada Foods, Ltd. ("Canada Foods") on sales made to the J. M. Smucker Company ("Smucker"), had violated Section 2(c) of the Clayton Act by granting allowances in lieu of brokerage to Smucker. On remand, the court of appeals on its own motion modified the Commission's cease-and-desist order by restricting the prohibitions against the payment or allowance of illegal brokerage to sales made by Broch to Smucker for Canada Foods. The questions now before the Court are (1) whether Broch's failure to challenge the scope of the order before the Commission precluded the reviewing court from considering the issue, and, if not, (2) whether the Commission's order is unduly broad.

The facts which are pertinent to these issues, as found by the Commission and accepted by the court of appeals in the earlier proceeding (O.R. 219), are as follows:

Broch is a broker or sales representative for approximately 25 principals, including Canada Foods, who sell food products (O.R. 175–176). Broch agreed to act for Canada Foods for a 5 percent commission (O.R. 14, 74, 127, 135, 149, 153, 178, 229). Canada Foods established a price for its 1954 pack of apple concentrate at $1.30 per gallon and authorized its several brokers, including Broch, to negotiate sales at that price (O.R. 108, 114, 144–145, 179). Smucker, a buyer of apple concentrate, insisted on a price of $1.25 for a large order (O.R. 179–183). Canada Foods was willing to meet Smucker's price only if Broch agreed to cut its brokerage on sales made to Smucker to 3 percent, which would result in Broch and Canada Foods sharing equally in the price concession to Smucker. Broch agreed, and the sale was made (O.R. 183–185, 231).

The reduced price of $1.25 was granted to Smucker on all sales during the 1954–1955 season and continued through the 1955–1956 season up to the time the hearings in this matter were closed in October 1956 (O.R. 81–82, 149–150, 185, 200, 201). But on Canada Foods' sales to all other customers, the price continued to be $1.30 and in each instance Broch received its regular 5 percent commission (O.R. 149–150, 185).

On these facts, the Commission held that Broch had violated Section 2(c) of the Clayton Act, and entered

an order (O.R. 202, 211) directing Broch, "in connection with the sale of food or food products for Canada Foods Ltd., or any other seller principal," to cease and desist from

> (1) Paying, granting or allowing, directly or indirectly, to The J. M. Smucker Company, *or to any other buyer,* or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. *or any other seller principal,* as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service; or
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> (2) In any other manner, paying, granting or allowing, directly or indirectly, to the J. M. Smucker Company, *or to any other buyer,* or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account.*

The court of appeals set aside the order upon the grounds that Section 2(c) does not apply to a seller's

* Italics supplied.

broker, and that Broch had not granted part of his commission, or an allowance in lieu thereof, to the buyer (O.R. 218–225). This Court, however, reversed both rulings. 363 U.S. 166.

Following the remand, Broch filed a motion which sought, *inter alia*, a modification of the order.[5] It contended that the order was too broad because it "purports to reach transactions by respondent without limitation on behalf of *any* seller with *any* buyer beyond the specific parties involved in this case" (R. 28, emphasis in original; see R. 26), and because it prevents Broch from engaging in certain conduct not found to be illegal (R. 25–26). The Commission's answer (R. 30–38) stated (R. 35) that the agency had adopted the order proposed in the hearing examiner's initial decision; that under the Commission's rules of practice an appeal from an initial decision is to be in the form of a brief, which must list the questions to be argued; and that Broch had raised no issue during the appeal proceedings before the Commission, as to the scope of the order. The Commission urged that the motion to modify should be denied under the established principle that a court called upon to review an order of an administrative agency may not consider an issue which had not been raised before the agency (R. 35–37). The answer also stated that, since Broch had made no argument to the court of appeals on this issue prior to the remand, it must be deemed

[5] The motion also asked the court to set aside the order on the ground that the Commission had failed to consider certain factors, the relevancy of which this Court had allegedly not determined (R. 22–25).

to have waived the point (R. 36–37). The Commission requested an opportunity to be heard in defense of the scope of the order on the merits if the court should decide that the merits were open for consideration (R. 37–38).

In its reply Broch characterized the Commission answer as resorting to "groundless technicalities" to preclude review of an "unduly restrictive injunction" based on a transaction "considered entirely lawful by this Court and four Justices of the Supreme Court" (R. 49).

The court thereupon entered an order which recited the foregoing pleadings and denied Broch's motion to modify (R. 51). However, "[o]n the court's own motion" it modified the Commission's order by deleting the words "or any other seller principal" and "or to any other buyer," and affirmed the order as so modified (R. 51–52). The modification restricted the prohibitions of the order to transactions in which Canada Foods was the seller and Smucker was the buyer—precisely the relief sought by Broch's motion to modify.

SUMMARY OF ARGUMENT

I

1. When this case was before the Federal Trade Commission, the respondent raised no objection to the scope of the order proposed by the hearing examiner in his initial decision. That order was entered by the Commission. Not only did respondent have adequate opportunity to challenge the breadth of the order on its appeal from the initial decision to the Commis-

sion, but the Commission's rules of practice required it to do so if it wished to raise the issue. In these circumstances, judicial modification of the scope of the order was foreclosed by the settled rule that issues not raised before an administrative agency are not open before the reviewing court. *Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 414; *Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 498–501; *United States* v. *Tucker Truck Lines,* 344 U.S. 33, 37; *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U.S. 385, 389.

While many of the decisions applying the rule were rendered under statutes which specifically bar judicial consideration of objections not made before the agency, the principle is not limited to such statutes. In both the *Tucker* and the *Moog* cases, *supra,* this Court held, under statutes which contain no explicit prohibition, that a reviewing court could not consider objections not raised before the agency.

The principle is no less applicable to objections to the form or scope of the order than to substantive issues. Indeed, since the rule is based upon the policy that an agency should have the initial opportunity to consider matters within its jurisdiction, its application is particularly appropriate when the challenge is to the scope of the order. For the "specialized, experienced judgment" that an agency must bring to bear "in the shaping of its remedies within the framework of regulatory legislation" (*Moog, supra* at 413) is equally necessary for evaluation of the claim that

narrower relief than has been proposed will nevertheless be adequate to protect the public interest.

2. The court of appeals apparently recognized the validity of the Commission's argument that the respondent's failure to question the scope of the order before the agency barred it from raising the issue on judicial review. For the court denied the respondent's motion to modify. The court, however, accomplished the identical result by making, on its own motion, the very modifications which it held the respondent itself could not directly seek. Such action was improper. This Court has held that the policy reflected in statutory provisions prohibiting the court from considering objections not urged before the agency would be "seriously undermine[d]" by permitting the reviewing court *sua sponte* to consider such objections. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 499; *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453, 457, 463–464. The rule, however, is not limited to such statutes and the policy upon which it is based would be equally "seriously undermine[d]" by *sua sponte* judicial action even though the statute does not expressly forbid it.

3. We recognize that a reviewing court is not absolutely barred from considering objections to the scope of the order that have not been made before the agency. If, for example, the agency acted wholly beyond its statutory authority, a court may properly modify the order to confine it within that limit. In the present case, however, the objection to the scope of the Commission's order is not that the agency may

never, as a matter of law, extend such an order beyond the particular persons involved in the violations found, but only that the broad order is unwarranted by the facts of this case. That contention, however, raises an issue addressed to the Commission's discretion, and is the kind of objection that must be made to the agency as a prerequisite to judicial review.

A litigant's failure to raise an issue before the agency may be excused if there were reasonable grounds therefor. Here, however, respondent has offered no excuse for its failure to do so, and there was in fact none. The fact that respondent challenged the "basis" for the Commission's order (Br. in Op. 10) does not excuse its failure to challenge the scope of the order. A party must give the agency "adequate notice that it intends to press the specific issue it now raises" (*National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, 350), and an attack upon the legal basis of the order is not "adequate notice" to the agency of the "specific issue" that, if any order is to be issued, it should be restricted to the particular parties involved and the violations found. Nor can respondent justify its failure to raise the issue before the Commission on the ground of alleged "supervening legal developments" (Br. in Op. 11), primarily, this Court's decision in *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479, which modified a Labor Board order. Even an intervening judicial decision that announces new law does not authorize a reviewing court to entertain an objection not raised in the administrative proceedings (*Tucker Truck Lines, supra*). The *Com-*

munications Workers case did not enunciate any new legal doctrine, but merely held that, under settled principles governing the scope of administrative orders, the facts in that case did not justify the order.

II

If, contrary to our contention, the Court of Appeals was authorized to consider objections to the scope of the Commission's order not raised before the agency, the court erred in limiting the order to sales by respondent on behalf of Canada Foods to Smucker. The Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices" (*Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611). It did not abuse that discretion in concluding that the order should prohibit respondent from engaging in illegal brokerage transactions with all purchasers on behalf of all sellers.

1. The Commission found that Broch had made illegal allowances in lieu of brokerage by accepting less than its agreed-upon rate of commission in order to consummate a large initial sale to a particular buyer at a lower price than was given to any other purchaser by the seller. The reduced price was given on subsequent sales. Having found these violations, the Commission was fully justified in prohibiting Broch from engaging in such illegal practices generally. The alternative to such an order—one that merely applied the prohibition to transactions with Smucker for Canada Foods—would not effectively "cure the ill effects of the illegal conduct and assure the public freedom from its continuance" (*United States v. United*

States Gypsum Co., 340 U.S. 76, 88). The Commission's order here is no more sweeping than numerous orders and decrees that have been upheld against the challenge that they went too far because not confined to the particular parties, localities or products to which the evidence of illegal conduct related. *E.g.*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 728–730; *United States Gypsum Co., supra*, p. 90.

2. *Communications Workers of America* v. *National Labor Relation Board*, 362 U.S. 479, where this Court modified a Labor Board order directed against unions to limit its prohibition to the particular employer involved, does not justify the modifications of the Commission's order made by the court of appeals. This Court held in *Communications Workers* that, on the facts of that case, there was "neither justification nor necessity for extending the coverage of the order generally" to cover "any other employer", and modified the order by eliminating those words (pp. 480–481). *Communications Workers* did not enunciate any new principle limiting the permissible scope of agency orders, or hold that a broad order is justified only if the record discloses a "generalized scheme" (p. 481) of law violation. On the contrary, the case turned on its particular facts. In the present case, an order that merely prohibits illegal brokerage on sales by Broch for Canada Foods to Smucker would not adequately protect the public interest, and the broader order entered by the Commission was both justified and necessary.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN NARROWING SUA SPONTE THE SCOPE OF THE COMMISSION'S ORDER, WHERE RESPONDENT HAD MADE NO OBJECTION TO THE BREADTH OF THE ORDER DURING THE ADMINISTRATIVE PROCEEDINGS

1. When this case was before the Federal Trade Commission, the respondent raised no objection to the scope of the order. The order entered by the Commission was the identical order proposed by the hearing examiner in his initial decision. Not only did respondent have adequate opportunity to challenge the breadth of the order on its appeal from the initial decision to the Commission, but the Commission's Rules of Practice required it to do so if it wished to raise the issue.

Section 3.22(b) of the Commission's Rules then in effect * (16 CFR 3.22, R. 45) provided that "the appeal [from an initial decision] shall be in the form of a brief," which "shall contain * * * (iii) A list of the questions involved and to be argued; and (iv) An argument presenting clearly the points of fact and law relied upon in support of the position taken on each question * * *." The rule further stated that "Material not included in the appeal may not be presented to the Commission in oral argument or otherwise." Respondent's appeal brief (R. 1–20), which

* The Commission's rules of practice governing adjudicatory proceedings were amended, effective July 21, 1961. 26 Fed. Reg. 6016.

under the rules constituted the specification of errors, raised no issue, either in the statement of questions involved or in the argument, as to the scope of the proposed order. On the contrary, the only issues it raised and argued were the substantive questions whether respondent's acts violated Section 2(c) and whether the proceeding furthered the public interest (see App., *infra*, pp. 39–40.)

In these circumstances, judicial modification of the scope of the order was foreclosed by the settled rule that issues not raised before an administrative agency are ordinarily not open before the reviewing court. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *National Labor Relations Board* v. *District 50, United Mine Workers of America*, 355 U.S. 453, 463–464; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37; *Unemployment Compensation Commission of Alaska* v. *Aragon*, 329 U.S. 143, 155; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 389; *United States* v. *Northern Pacific R. Co.*, 288 U.S. 490, 494.

While many of those decisions were rendered under statutes which specifically bar judicial consideration of objections not made before the agency, the principle is not limited to statutes which so provide. Thus, in *United States* v. *Tucker Truck Lines, supra*, the Court held that a litigant's failure to challenge the qualification of a hearing examiner before the Interstate Commerce Commission barred it from sub-

sequently raising the issue in court, even though an intervening decision of this Court had held that such an examiner was not qualified. The Interstate Commerce Act, like the Federal Trade Commission Act, does not in terms require the raising of issues before the agency as a prerequisite to judicial consideration. Yet the Court did not deem that fact significant. It stated (344 U.S. at 36–37, footnotes omitted):

> * * * We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts * * * Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

In *Moog Industries* v. *Federal Trade Commission, supra,* the Court applied this principle in holding that the court of appeals had properly refused to postpone the effective date of a Commission cease-and-desist order directed against one company, until the agency had entered similar orders against the company's competitors. The Court held (355 U.S. at 414)—

> If the question has not been raised before the Commission * * * a reviewing court should not in any event entertain it.

The principle is no less applicable to objections to the form or scope of the order than to substantive issues. *National Labor Relations Board* v. *District 50, United Mine Workers,* 355 U.S. 453, 457–458; *National Labor Relations Board* v. *Cheney California Lumber Co.,* 327 U.S. 385; *National Labor Relations Board* v. *Enterprise Ass'n,* 285 F. 2d 642, 646 (C.A. 2). Indeed, the policy which underlies the rule—the desirability of giving the agency the initial opportunity to consider matters within its jurisdiction (see *infra,* p. 18)—makes the application of the rule particularly appropriate when the challenge is to the scope of the order. For the "specialized, experienced judgment" that an agency must bring to bear "in the shaping of its remedies within the framework of regulatory legislation" (*Moog Industries, Inc.* v. *Federal Trade Commission,* 355 U.S. 411, 413) is equally necessary for evaluation of the claim that narrower relief than has been proposed will nevertheless be adequate to protect the public interest. Since this is a judgment that "calls for the application of technical knowledge and experience not usually possessed by judges" (*Federal Power Commission* v. *Colorado Interstate Gas Co.,* 348 U.S. 492, 501), it is necessarily one that lies especially within the province of the agency that is expert in the field.

The requirement that timely objection be made before the agency is, of course, a particularized application of the general principle of exhaustion of administrative remedies. The principle, as explained in the Senate committee report on the bill that be-

cause the Administrative Procedure Act (S. Doc. No. 248, 79th Cong., 2d Sess., p. 289, n. 21), is that—

> A party cannot wilfully fail to exhaust his administrative remedies and then, after the agency action has become operative, * * * resort to court without having given the agency an opportunity to determine the questions raised. If he so fails he is precluded from judicial review by the application of the time-honored doctrine of exhaustion of administrative remedies. * * *

Thus, where Congress has committed matters to an administrative agency, "orderly procedure and good administration require" that timely objections be made before the agency "while it has opportunity for correction in order to raise issues reviewable by the courts" (*Tucker Truck Lines, supra*). Otherwise, the agency is denied the opportunity to correct any error it has made, and thus to avoid the need for judicial review; the reviewing court is denied the benefit of the agency's expert judgment on matters committed to it by Congress; and litigants are encouraged to withhold objections from the agency for the purpose of creating issues for judicial review. The rule requiring the raising of objections before an agency is thus grounded on fundamental considerations of public interest and sound judicial administration. On the other hand, there is no unfairness in requiring a litigant to raise all his contentions before the agency—particularly where, as here, the agency's Rules of Practice explicitly state that "Material not included in the appeal may not be presented to the Commission * * *."

In practice the Commission does address itself to the scope of a proposed order on appeal from the trial examiner's decision even though the respondent does not raise the point specifically. Indeed, the Commission has modified an unduly broad order even though the respondent consented to its scope. *Automatic Canteen Co.*, 46 F.T.C. 861, 897, affirmed, 194 F. 2d 433 (CA 7), reversed on other grounds, 346 U.S. 61. In the present case the Commission concluded that the order recommended by the examiner was the proper remedy. This practice gives assurance that the Commission will not enter an order which is beyond its power or unjustly restrictive, but it is not a substitute for a particularized objection by the respondent which would focus attention upon any objection to the scope of the order, enable the Commission to consider and meet the specific point, and invite additional evidence and new consideration if necessary. The respondent's failure, in this case, to particularize its objection, as the Commission's Rules require, bars it from raising the point upon judicial review.

2. The court of appeals apparently recognized the validity of the Commission's argument upon this point, for it denied the respondent's motion to modify, but it accomplished the identical result by making, on its own motion, the very modifications which it held the respondent itself could not directly seek. In so doing, the court exceeded the limits of permissible judicial review.

This Court has held that, under statutes specifically prohibiting the court from considering objections not

urged before the agency, the court cannot *sua sponte* consider such objections. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498–501; *National Labor Relations Board* v. *United Mine Workers*, 355 U.S. 453, 457, 463–464. In the *Colorado* case, the Court pointed out (p. 499) that the statutory provision there involved (Section 19(b) of the Natural Gas Act) "reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a court of appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission." As we have shown (*supra*, pp. 15–16), the rule barring judicial consideration of objections not raised before the agency is not limited to statutes which specifically so provide. The policy precluding challenges to an agency order upon a ground not presented to the agency would be equally "seriously undermine[d]" (*Colorado Gas, supra*) by *sua sponte* judicial action under a regulatory statute which does not contain an express prohibition.

3. We recognize, of course, that a reviewing court is not absolutely barred from considering objections to the scope of the order that have not been made before the agency. If, for example, the agency "has patently traveled outside the orbit of its authority so that there is, legally speaking, no order to enforce" (*National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388), a court may properly modify the order to confine it within the

limits of the agency's authority. In the instant case, however, the objection to the order was not that the Commission may never, as a matter of law, extend the prohibitions of an order under Section 2(c) beyond the particular persons involved in the violations found. Such a position would plainly be untenable, as respondent apparently recognized (R. 28). The contention here was only that the broad order was not warranted by the facts of this particular case, *i.e.*, that the record did not justify a prohibition on illegal brokerage transactions with all persons, rather than just with Canada Foods and Smucker. That contention, however, related to the exercise of the Commission's discretion, and it is the kind of objection that must be made to the agency as a prerequisite to judicial review.

A litigant's failure to raise an issue before the agency may be excused if there were reasonable grounds therefor.[7] Here, however, the respondent

[7] Most of the cases which respondent cites for its statement (Br. in Opp. 12, emphasis in original) that "the courts have often revised unjustifiably sweeping FTC orders—*even in the absence of a specific prior challenge to the order's verbiage at the administrative level*," fall within this category. They were cases in which there was no occasion to raise the objection before the agency, either because there was no initial decision by the hearing examiner and the Commission's order was the only order subject to challenge (*Bork Mfg. Co.*, FTC Docket No. 5525, *Bork Mfg. Co.* v. *Federal Trade Commission*, 194 F. 2d 611 (C.A. 9)), or because the examiner's ruling was in favor of the respondent and there was therefore no proposed order to challenge before the Commission (*Folds*, FTC Docket No. 5332, *Folds* v. *Federal Trade Commission*, 187 F. 2d 658 (C.A. 7); *Milk and Ice Cream Can Inst.*, FTC

"did not offer nor did the court require any excuse for its failure to raise the objection" (*United States* v. *Tucker Truck Lines*, 344 U.S. 33, 35) during the administrative proceedings. Respondent was fully aware of the order proposed by the examiner; it had adequate opportunity to challenge its scope on the appeal from the initial decision; and it was on notice that, if it wished to do so, it was required to raise the issue. Indeed, respondent did not even raise the issue in its initial presentation to the court of appeals, either in its petition for review* or in its

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Docket No. 4551, *Milk and Ice Cream Can Inst.* v. *Federal Trade Commission*, 152 F. 2d 478 (C.A. 7); *Etablissements Rigaud, Inc.*, FTC Docket No. 3337, *Etablissements Rigaud, Inc.* v. *Federal Trade Commission*, 125 F. 2d 590 (C.A. 2). (Neither the statutes which the Commission administers, nor the Commission's Rules of Practice, require petitions for rehearing before a matter initially raised in the Commission's final decision can be presented on appeal.)

In at least one of the other cases, objection to the scope of the order was specifically made before the Commission (*Reynolds Tobacco Co.*, FTC Docket No. 4795, *R. J. Reynolds Tobacco Co.* v. *Federal Trade Commission*, 192 F. 2d 535 (C.A. 7). In one case the modification merely clarified the order to conform it to the Commission's intention (*Standard Container Mfgrs.' Ass'n.* FTC Docket No. 3289; *Standard Container Mfrs.' Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262 (C.A. 5)). In the remaining cases, the modifications either were immaterial or were based upon reversal of the finding upon which the changed portion of the order rested (*Folds, supra; Parker Pen Co.* v. *Federal Trade Commission*, 159 F. 2d 509 (C.A. 7); *Gelb* v. *Federal Trade Commission*, 144 F. 2d 580 (C.A. 2)).

*The petition to review (O.R. 212-215) stated seven grounds for relief, only one of which even dealt with the order. The seventh ground was that "The order of the Commission is defective in that it is vague, exceeds the statutory limits of Sec-

briefs.[9] It first made the contention in its motion to vacate, more than four years after the order had first been proposed by the examiner, and only after this Court had upheld the Commission on the merits. Here, as in *Tucker Truck Lines, supra*, "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings * * *" (344 U.S. at 36).

It is no answer to say, as respondent does (Br. in Opp. 10, emphasis added), that "the *basis* for the

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tion 2(c), and as applied would conflict with the Sherman Act" (O.R. 214). The latter two claims are no more than a restatement of respondent's basic contention that the Commission had misinterpreted Section 2(c). The first claim—that the order is "vague"—did not raise the point that the order should be restricted to the particular buyer and seller involved in the case. The basis upon which respondent sought such a restriction was not that the broader order was "vague," but that it was unjustified by the violations shown.

The fact that the respondent did not challenge the scope of the order in its petition to review distinguishes this case from the recent decision of the Second Circuit in *Swanee Paper Corporation* v. *Federal Trade Commission*, 291 F. 2d 833. In *Swanee* the court considered a challenge to the breadth of the order, not made before the agency, which it held had been raised in the petition for review. The court ruled that, under the 1959 amendments to the Clayton Act, the Commission could have then modified the order. The 1959 amendments authorize the Commission to modify its order before the record has been filed in the court of appeals (15 U.S.C. (Supp. II) 21(b))—an authority not contained in the Act as it existed at the time of this case.

[9] Respondent's briefs in the court of appeals raised no issue with respect to the scope of the order, either in the statement of the eight "Contested Issues" (see App. *infra*, pp. 41–42), in the "Propositions and Authorities" relied upon, or in the argument. Copies of those briefs have been lodged with the Clerk.

Commission's order was contested throughout the administrative proceeding." That is but another way of stating that throughout the proceedings respondent contended that it had not violated the Act. A challenge to the legal basis of the order, however, is not the same thing as a challenge to its scope. The former questions whether any order at all should be entered, while the latter assumes that some order is proper but questions the propriety of the particular order proposed. Since the reason for requiring a party to raise an issue before the agency is to give the latter an opportunity to consider and determine the objection, the party must give the agency "adequate notice that it intends to press the specific issue it now raises" (*National Labor Relations Board* v. *Seven-Up Co.*, 344 U.S. 344, 350; see, also, *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498, and *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255). An attack on the legal basis of the order is not "adequate notice" to the agency of the "specific issue" that, if any order is to be entered, it should be restricted to the particular parties involved in the violations found.

Nor can respondent justify its failure to raise the issue before the Commission on the ground of "supervening legal developments" (Br. in Opp. 11). Respondent cites *Communications Workers* v. *National Labor Relations Board*, 362 U.S. 479 (discussed *infra*, pp. 35–37), which modified a Labor Board order directed against unions to limit its prohibitions to the

particular employer involved,"[10] as an unforeseen development, but the failure to anticipate that decision plainly does not excuse respondent's failure to challenge the scope of the order before the Commission. *First*, this Court has previously held, in circumstances far stronger than the present case, that even an intervening judicial decision announcing new law does not authorize a reviewing court to entertain an objection not raised in the administrative proceedings. *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 36; cf. *Sunal* v. *Large*, 332 U.S. 174.[11] *Communications*

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[10] Respondent also relies (Br. in Opp. 11) upon the 1959 amendments to the Clayton Act, which gave the Commission "reinforced authority * * * to impose heavy fines for violation of final cease and desist orders * * *." Those amendments, however, have been held inapplicable to orders entered prior to their effective date. *Sperry Rand Corporation* v. *Federal Trade Commission*, 288 F. 2d 403 (C.A.D.C.). The order in this case was entered in 1957.

[11] In the *Tucker* case, the hearing examiner who conducted the proceedings before the Interstate Commerce Commission had not been appointed pursuant to Section 11 of the Administrative Procedure Act. After the administrative proceeding had been completed, and while the matter was pending before the reviewing court, this Court held that examiners hearing such cases had to be so appointed. *Ries & Co.* v. *United States*, 341 U.S. 907. This Court held in *Tucker*, however, that the litigant's failure to challenge before the Commission the examiner's qualification barred the reviewing court from entertaining the objection. *Tucker* was thus a far stronger case than this one for excusing the failure to raise the issue before the agency. For in *Tucker* the claim was that "if the appointment of the hearing examiner was irregular, the Commission in some manner lost jurisdiction and its order is totally void" (344 U.S. at 33). In the instant case, however, there is no such jurisdictional claim, but only the factual argument that the broad order is not justified by the record.

Workers did not purport to change that rule. See *National Labor Relations Board* v. *Enterprise Ass'n*, 285 F. 2d 642, 646–647 (C.A. 2). While no objection was made before the Board in *Communications Workers* to the scope of the order, the reason was that the union had prevailed before the hearing examiner, and therefore had no occasion to challenge the scope of the order before the agency (Record No. 418, O.T., 1959, pp. 64–65, 69).[12] In the instant case, however, respondent had lost before the examiner, and had full opportunity to challenge the order before the agency. *Second*, the *Communications Workers* case did not enunciate any new legal doctrine. It merely held that, under the usual principles governing the scope of administrative orders, the facts in that case did not justify the order (see *infra*, pp. 35–37). The decision was clearly foreshadowed by such cases as *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426. Nothing in the *Communications Workers* decision provided respondent with any new ground for challenging the scope of the Commission's order, which was not already available to him during the administrative proceedings in this case.

[12] The provision of the Board order which this Court eliminated as too sweeping in *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, was in somewhat different form from that proposed by the examiner. The respondent before the Board did, however, challenge the scope of the order in its exceptions to the examiner's report. Record, No. 442, O.T., 1940, Vol. I, pp. 39–40, 47, 71–72.

II

THE COMMISSION DID NOT ABUSE ITS DISCRETION IN PROHIBITING BROCH FROM ENGAGING IN ILLEGAL BROKERAGE IN ITS DEALINGS WITH ALL BUYERS AND SELLERS, RATHER THAN LIMITING THE PROHIBITION TO THE PARTICULAR BUYER AND SELLER INVOLVED IN THE VIOLATIONS FOUND

If, contrary to our contention, the court of appeals was authorized to consider objections to the scope of the Commission order not raised before the agency, the court erred in modifying the order to limit its prohibitions to sales to Smucker by respondent on behalf of Canada Foods.

The principles governing the scope of Commission cease-and-desist orders and the limited extent of judicial review thereof are too well settled to require elaboration. The Commission has "wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices". *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611; *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–429. In exercising its "specialized, experienced judgment * * * in the shaping of its remedies" (*Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 413), the Commission not only may "appraise the facts of the particular case" but also may "draw from its generalized experience" (*Siegal, supra*, p. 614). It is "not required to limit

its prohibition to the specific" violation found but "must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Ruberoid Co., supra,* 343 U.S. 473, 474; *National Lead Co., supra,* 352 U.S. at 429. Judicial review in this area is "limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * [T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist" (*Siegel, supra,* pp. 612, 613; *Federal Trade Commission* v. *Mandel Brothers,* 359 U.S. 385, 393).

Under these principles, the Commission did not abuse its "wide discretion in its choice of a remedy" (*Siegel, supra*) in concluding that the order in this case should prohibit respondent from engaging in the illegal brokerage transactions with all purchasers on behalf of all sellers, rather than only with the particular buyer and seller involved in the violations found.

1. The record shows that Broch, acting as a broker on behalf of 25 seller principals, makes substantial sales of food products to customers in various states (O.R. 175–176). Although Broch had agreed with Canada Foods that its commission would be five percent on all sales (O.R. 14, 74, 127, 135, 149, 153), it accepted a commission of three percent in October 1954, in order to consummate a large sale to a particular buyer at a lower price than was given to any other purchaser by Canada Foods (O.R. 149–150, 183–185).

The reduced price (accomplished in part through a reduction in Broch's brokerage) was given to the particular favored purchaser (Smucker) on all subsequent sales consummated through Broch in December 1954, in 1955, and up to the time the hearings in this case were closed in October 1956 (O.R. 185). The Commission held, and this Court agreed, that such conduct by Broch constituted an illegal allowance in lieu of brokerage that was prohibited by Section 2(c) of the Clayton Act.

Having found such violations, the Commission realistically had two choices as to the type of remedy. It could either have prohibited Broch from engaging in such illegal transactions generally, or it could have limited the prohibition to transactions with Smucker on behalf of Canada Foods. The Commission chose the broad remedy. The order (O.R. 202) prohibited Broch, in connection with the sale of food or food products for Canada Foods "or any other seller principal," from (1) paying, granting or allowing to Smucker "or to any other buyer"—

> any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any food or food products to such buyer at prices reflecting a reduction from the prices at which sales of such foods are currently being effected by respondents for Canada Foods Ltd. or any other seller principal, as the case may be, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage service;

or (2) "In any other manner, paying, granting or allowing" to Smucker "or to any other buyer * * * anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof upon, or in connection with, any sale of food or food products to such buyer for its own account."

Paragraph (1) prohibits the violation in the precise form in which Broch committed it. Paragraph (2) prohibits Broch, "[i]n any other manner," from accomplishing the same illegal result, *i.e.*, paying or allowing a portion of its brokerage to a favored customer. Paragraph (2) is a reasonable exercise of the Commission's authority "effectively to close all roads to the prohibited goal"; "the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past" (*Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473).[13]

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[13] Respondent argues (Br. in Opp. 7–8) that, in two respects, the order prohibits conduct that is permissible under Section 2(c). Neither argument is valid; in any event, such invalidity would not justify the sweeping modification of the order made by the court of appeals.

1. Respondent contends (Br. in Opp. 7, emphasis in original) that it would violate the order "[i]f any future reduction in [its] brokerage commission by the seller were 'passed on' as a *uniform* price 'allowance' * * * to *all* customers." But "the order in its relation to the circumstances of this case" (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 52; *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 423–425), plainly does not forbid this conduct. As this Court expressly noted (363 U.S. at 175–176), both the Hearing Examiner (O.R. 198–199) and the Commission (O.R. 209–210) made it clear that

The court of appeals modified the order by striking the words "or any other seller principal" and "or to any other buyer." The effect was to limit the prohibitions to sales by Broch for Canada Foods to Smucker. It leaves Broch free to engage in the same or related violations even on behalf of Canada Foods with any other buyer, or even with Smucker on behalf of any other seller.

Such a limited order would not effectively "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance" (*United States* v. *United States Gypsum Co.*, 340 U.S. 76, 88), and the Commission was justified in adopting the broader order. The Commission was not required to leave Broch free to commit similar violations with any other sellers or purchasers. Rather, the Commission could properly weigh all the circumstances—including the

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not every reduction in brokerage accompanied by a reduction in price automatically constitutes a violation.

2. The other contention (Br. in Opp. 8) is that the order might preclude respondent, if it were charged with violation, from showing certain circumstances that might allegedly be a defense, such as that a reduction in brokerage was made because the buyer performed services ordinarily performed by the broker. But there is nothing in the order indicating that any such circumstances, to the extent they might be relevant, would not be considered in determining whether the order had been violated. Should such "hypothetical situations * * * rise up to plague" respondent, "they can be presented to the Commission in evidentiary form rather than as fantasies." *Federal Trade Commission* v. *National Lead Co.*, *supra*, 352 U.S. 419, 431.

nature of Broch's business and of the food brokerage business generally, the type of violation found, the wilfulness of the violation, the relationships between Broch and its customers—and conclude that the particular violation found was not unique or limited to Broch's dealings with Canada Foods and Smucker, but was of a kind likely to be repeated in other transactions if not prohibited. In these circumstances, it would give the public inadequate protection if the Commission were required to institute a new proceeding, and to enter a separate order, each time that a broker violates the law with a different principal or customer. Broch cannot properly complain because, having violated Section 2(c) in its dealings with a particular seller and buyer, it is prohibited from repeating such violations with other buyers and sellers as well. "[T]hose caught violating the Act must expect some fencing in" (*Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431).

The Commission's order here is no more sweeping than numerous orders and decrees that have been upheld against the challenge that they went too far because not confined to the particular parties, localities, or products to which the evidence of illegal conduct related. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 728–730; *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90; *Wilson & Co.* v. *Benson*, 286 F. 2d 891, 896 (C.A. 7); *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 715, 718 (C.A. 4); *Hershey Choc. Corp.* v. *Federal Trade Commission*, 121 F. 2d 968, 971–972 (C.A. 3);

Eugene Dietzgen Co. v. *Federal Trade Commission*, 142 F. 2d 321, 329–330 (C.A. 7). Cf. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 474–475.

In the *Cement Institute* case, *supra*, the respondents had combined among themselves to restrain competition through the use of a basing-point pricing system. Respondents objected to the provision in the Commission's order which would prevent them from engaging in the prohibited conduct with "others not parties hereto." In rejecting this objection, the Court noted not only that cement producers had secured the aid of non-parties in carrying out their program, but also that "the construction of new mills * * * may be reasonably anticipated." 333 U.S. at 728–729. The Commission was therefore "authorized to make its order broad enough effectively to restrain respondents from combining with others as well as among themselves." *Id.* at 729. Similarly, in the present case the mere fact that the evidence did not relate to illegal conduct in transactions involving parties other than the particular seller and the particular buyer does not limit the Commission's authority "to make its order broad enough effectively to restrain" Broch's illegal conduct in transactions with such other parties. For, as this Court said in rejecting the objections to the order in *Cement Institute*, "the prohibitions in the order forbid no activities except those which if continued would directly aid in perpetuating the same old unlawful practices." *Id.* at 727.

The statement of this Court in *United States* v. *United States Gypsum Co.*, 340 U.S. 76, 90, in ap-

proving a Sherman Act decree not confined to the particular geographical area to which the evidence related, applies with equal force here (with the necessary change from geographical areas to parties):

> The complaint of * * * violation was restricted to the eastern territory of the United States. The evidence applied only to that area. However, the close similarity between interstate commerce violations * * * in eastern territory and western territory seems sufficient to justify the enlargement of the geographical scope of the decree to include all interstate commerce. * * *

Similarly, in the *Wilson & Company* case, *supra*, the court below refused to modify an order of the Secretary of Agriculture directed against discriminatory pricing activities by a meat packer, where modification was sought on the ground that although the practices involved only the packer's "relatively small and local San Francisco hotel supply business," the order covered "its sales of meat and meat food products throughout the United States" (286 F. 2d at 896).

The lack of any explanation in the Commission's opinion for the scope of the order throws no doubt upon its validity. The broad order was proposed by the examiner. Since respondent, in its appeal to the Commission from the examiner's proposals, made no objection to the breadth of the order, the Commission was warranted in assuming that it was not contesting that issue. Accordingly, there was no occasion for the Commission to articulate why it was following its customary practice under Section 2(c) of issuing an

order not restricted to the particular parties involved in the violations found. If respondent had objected before the Commission to the scope of the order, the agency could then have focussed upon the particular objections, and explained the reasons for the order ultimately adopted. (See Point I, *supra*, pp. 14–27.)

2. *Communications Workers of America* v. *National Labor Relations Board*, 362 U.S. 479, upon which respondent primarily relies (Br. in Opp. 7–9; R. 26–28), does not justify the modifications of the Commission's order made by the court of appeals. In that case the Labor Board had found that a local union whose members were employees of Ohio Consolidated Telephone Co., and the national union of which the local was a member, had committed acts constituting unfair labor practices in the course of a strike by employees of Ohio Consolidated. The Board's cease-and-desist order ran against both unions, and prohibited improper coercion of the employees of Ohio Consolidated "or any other employer". This Court, noting that neither union was "found to have engaged in violations against the employees of any employer other than Ohio Consolidated," and that there was no "generalized scheme" to engage in illegal activities "against all telephone employers," held that there was "neither justification nor necessity for extending the coverage of the order generally by the inclusion therein of the phrase 'any other employer,'" and modified the order by eliminating those words. Pp. 480–481.

We do not read *Communications Workers* as enunciating any new principles limiting the permissible scope of agency orders, or as holding that a broad order is justified only if the record discloses a "generalized scheme" of law violation. On the contrary, the case merely applied the principles previously announced in *National Labor Relations Board* v. *Express Pub. Co.*, 312 U.S. 426, to the particular facts there involved.

The local represented only members of Ohio Consolidated (Petitioners' Brief, No. 418, O.T., 1959, p. 4). The relations between a single employer and the union representing its employees are sufficiently unique to prevent proof of misconduct during a single strike against one employer from laying the foundation for an inference that the same unfair labor practices might be repeated against another employer unless enjoined. The national union had participated only indirectly in the illegal acts committed during the strike; it was held responsible only because it had "approved and financially supported" the "strike action of the Local" (Record, No. 418, O.T., 1959, p. 12). In these circumstances, the absence of any "generalized scheme" by the national to engage in similar illegal activities "against all telephone employers" made the broad order unjustified and unnecessary. For such an order inevitably would have had a serious inhibiting effect, in the sensitive area of labor relations, upon the activities of a national union which had

approximately 260,000 members and 730 locals, and represented the employees of approximately 100 employers throughout this country and Canada (Pet. Br., No. 418, O.T., 1959, pp. 3–4); and there was nothing to show any need for extending protection against coercion to employees of all other employers with which the national might deal.

In the instant case, however, as we have shown, an order that merely prohibits illegal brokerage on sales by Broch for Canada Foods to Smucker would not adequately protect the public interest. The broader order entered by the Commission operates in a narrow area of anticompetitive conduct specifically outlawed by Congress, namely, the illegal payment or allowance of brokerage by a seller's broker. There was nothing peculiar to the relations between Canada Foods, Smucker and respondent which impairs the natural inference that respondent, having made an illegal allowance in dealing with them, was ready to grant the same competitive advantage to other large buyers. The broader order is both justified and necessary.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded to enter a judgment affirming the order of the Commission.

Respectfully submitted.

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APPENDIX

BROCH'S STATEMENT OF THE ISSUES PRIOR TO THE REMAND

Before the Federal Trade Commission

***Appeal Brief* (R. 5-6):**

QUESTIONS PRESENTED

* * * * *

The basic legal questions before the Commission are:

(1) Whether Section 2(c)'s ban on commissions by a seller "to the *other party*" or the intermediary of the *other "party"* also imposes a liability on an independent seller's broker.

(2) Whether an independent broker's acquiescence in a smaller commission at the seller's behest can be deemed a "*payment to*" *the "other party"* in the transaction *by the broker.*

(3) Whether an outright price reduction not directly related to a given brokerage commission in conception or size nevertheless constitutes an allowance "in lieu of brokerage."

(4) Whether the paramount public interest is fostered by a formal proceeding based on an isolated transaction of *de minimis* scope generating a purely private grievance between a respondent and a disgruntled rival; and whether it is in the public interest to construe the Brokerage Clause to inhibit price bargaining by creating a privileged sanctuary for broker-

age commissions sheltered by law from the normal competitive stresses of the market.

Before the Court of Appeals

Petition for Review (O.R. 214–215):

GROUNDS FOR RELIEF

Petitioner's request for judicial relief is based on the grounds that:

1. The Commission erred in its interpretation and application of Section 2(c) of the amended Clayton Act.

2. The Commission misconstrued Section 2(c) of the amended Clayton Act so as to unlawfully conflict with the objectives of antitrust policy expressed in the Sherman Act.

3. The Commission's construction of Section 2(c) of the amended Clayton Act violates the Fifth Amendment of the Constitution of the United States in that it arbitrarily denies petitioner the opportunity of competing for business and otherwise discriminates against it and hence deprives it of valuable property rights without due process of law.

4. The Commission's interpretation of Section 2(c) of the amended Clayton Act is contrary both to the intent of Congress as expressed in the legislative history and to the general public interest.

5. The inferences drawn by the Commission based upon the facts of record are erroneous in fact and law.

6. There is no substantial evidence of record which supports the Commission's rulings.

7. The order of the Commission is defective in that it is vague, exceeds the statutory limits of Section 2(c), and as applied would conflict with the Sherman Act.

RELIEF PRAYED

Wherefore, petitioner prays that this Court review the action of the Federal Trade Commission, enter a decree setting aside the agency's findings, conclusions, and order issued on December 10, 1957, as well as directing the Commission to dismiss its complaint against petitioner, and to award such further or alternative relief as the Court may deem equitable and just.

Brief (pp. 9–10)

CONTESTED ISSUES

1. Does Section 2(c) of the amended Clayton Act guarantee permanently fixed rates of commission to brokers which may not be reduced by the seller principal when compelled to lower the price of his goods to a buyer in order not to lose a sale.

2. May the Federal Trade Commission interpret Section 2(c) of the amended Clayton Act to impose unconditional liability on an independent broker for an open price reduction by the seller accompanied by a reduction in brokerage commission.

3. May the Federal Trade Commission interpret Section 2(c) of the amended Clayton Act to foreclose all opportunity to demonstrate that the seller's price to the buyer did not reflect or represent an allowance "in lieu of brokerage."

4. May the Federal Trade Commission bypass Section 2(a) of the amended Clayton Act by proceeding against an open price reduction under Section 2(c) which obviates proof of injury to competition and denies the affirmative legal defenses afforded a respondent in a Section 2(a) case.

5. May the Federal Trade Commission nullify Section 2(a) of the amended Clayton Act by proceeding under Section 2(c) to pro-

hibit price differentials which are justifiable and allowable under Section 2(a).

6. May the Federal Trade Commission interpret the Robinson-Patman Act to give rise to price rigidity and uniformity in open conflict with the national antitrust policy and the interest of the consuming public in lower food prices.

7. Is the public interest served by a formal proceeding based on a transaction of *de minimis* dimensions.

8. May the Federal Trade Commission allow its process to be used to further the private interest of a private person.

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